

POMERANTZ LLP

Jordan L. Lurie, State Bar No. 130013

jllurie@pomlaw.com

Ari Y. Bassar, State Bar No. 272618

abassar@pomlaw.com

1100 Glendon Avenue, 15th Floor

Los Angeles, CA 90024

Telephone: (310) 432-8492

*Attorneys for Plaintiff
(Specially Appearing)*

**UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE DIVISION**

SHARI ROSENMAN, individually and on
behalf of all others similarly situated,

Plaintiff,

vs.

FACEBOOK, INC., a Delaware corporation
headquartered in California,

Defendant.

Case No. 3:21-cv-02108-LHK

CLASS ACTION

**MEMORANDUM OF POINTS AND
AUTHORITIES IN SUPPORT OF
PLAINTIFF'S MOTION TO
REMAND**

Date: August 12, 2021
Time: 1:30 p.m.
Courtroom: B, Fourth Floor
Judge: Hon. Lucy H. Koh

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1 **I. INTRODUCTION AND SUMMARY OF THE ARGUMENT**

2 Plaintiff Shari Rosenman (“Plaintiff”) hereby moves to remand this matter. While it
3 may be more convenient for Defendant Facebook, Inc. (“Facebook”) to have this matter
4 wrapped into the *Klein* consolidated actions already before this Court, this Court lacks
5 jurisdiction over this case, and, therefore, this case must be remanded.

6 Facebook’s sole basis for removal is federal question jurisdiction. Facebook admits in
7 its Notice of Removal of Action Under 28 U.S.C. section 1441(a) (Federal Question) (“Notice”)
8 (ECF No. 1), as it must, that the Complaint does not expressly allege a violation of federal
9 antitrust law. Rather, Facebook contends that Plaintiff has engaged in artful pleading and that
10 Plaintiff’s Complaint “requires proving that Facebook acquired and maintained an illegal
11 monopoly, which is exclusively a federal question.” (Notice at 2.) *See also* Notice at 7 (“The
12 Complaint necessarily raises a federal antitrust issue – whether Facebook is an illegal monopoly
13 – which is actually disputed and substantial, and therefore falls within this Court’s original
14 jurisdiction over civil actions arising under federal law.”).

15 Facebook is wrong. Plaintiff’s California Unfair Competition Law (“UCL”) action is a
16 straightforward state law consumer claim that challenges the substance of Facebook’s privacy
17 policies. Importantly, this action does not require Plaintiff to establish that Facebook violated
18 any federal law in order to prevail on her claims, and Facebook’s conduct as alleged by Plaintiff
19 violates the UCL *regardless of whether it represents a violation of federal antitrust law*.

20 The Complaint is not federal in character and does not assert a federal law claim or a
21 violation of any federal law. Plaintiff’s claim does not depend on a finding that Facebook is a
22 “monopoly” or has engaged in “monopolistic conduct.” Plaintiff’s right to relief does not
23 depend on resolution of any disputed federal question, and federal law is not essential to her
24 claim. Under these circumstances, courts repeatedly have found lack of federal question
25 jurisdiction. The issues raised by the *Rosenman* action are purely state law issues and are
26 properly resolved by a State, not a federal, court.

27 Accordingly, this action properly belongs in State court. Plaintiff’s motion to remand
28 should be granted.

II. BACKGROUND

This is Plaintiff’s second attempt to keep this action where it belongs – in state court. Plaintiff filed her initial Complaint in the Superior Court of the State of California, County of San Mateo on December 14, 2020. Facebook removed the initial action, primarily on the ground that the Class, as initially defined, allowed for diversity jurisdiction. Rather than burdening this Court with litigating removal, Plaintiff dismissed the initial Complaint and filed the current action, which carefully limits the Class to California citizens only, thereby precluding diversity jurisdiction.

Even so, on March 25, 2021, Facebook removed the current action, this time solely on the basis of federal question jurisdiction, even though Facebook admits that the Complaint does not expressly allege a violation of federal antitrust law.

III. LEGAL STANDARD FOR REMOVAL

In determining whether removal jurisdiction exists, courts construe their jurisdiction narrowly, against removal. *Shamrock Oil & Gas Corp. v. Sheets*, 313 U.S. 100, 108-09 (1941). Defendant, as the removing party, bears the burden of demonstrating that removal jurisdiction is proper, and “[f]ederal jurisdiction must be rejected if there is any doubt as to the right of removal in the first instance.” *Gaus v. Miles, Inc.*, 980 F.2d 564, 566 (9th Cir. 1992) (creating a “strong presumption against removal jurisdiction”) (citations omitted). Thus, a court should resolve all ambiguity in favor of remand to state court. *Id.* “The removal statute is strictly construed, and any doubt about the right of removal requires resolution in favor of remand.” *Moore-Thomas v. Alaska Airlines, Inc.*, 553 F.3d 1241, 1244 (9th Cir. 2009) (citing *Gaus*, 980 F.2d 564, 566).

IV. PLAINTIFF’S ALLEGATIONS

This is not an antitrust case. That ground is already being plowed by the bevy of cases already pending before this Court. Plaintiff Roseman alleges a different theory entirely: that Facebook promises its users it will protect their data and privacy, only to break those promises and expose consumers to ever worse privacy settings. ¶1. This is a straightforward state law consumer UCL claim that challenges Facebook’s privacy policies.

Further, nothing in Plaintiff's Complaint states a federal claim, and Plaintiff has made clear that she wishes to proceed in state court, not federal court. As the Complaint alleges:

Plaintiff's California state law claims do not allege a violation of any antitrust law or reference a violation of federal antitrust laws. Plaintiff's claims are not federal in character. Federal law is not an element of Plaintiff's claims and does not create Plaintiff's cause of action, and Plaintiff's claims do not rest on the allegation that Facebook violated any federal law. Plaintiff's right to relief does not depend on resolution of any disputed federal question, and federal law is not essential to her claim.

The gravamen of Plaintiff's case does not require any finding that Facebook violated any federal law, and Plaintiff will not have to establish that Facebook violated any federal law in order to prevail on her claims. Plaintiff's claim also does not depend on a finding that Facebook is a "monopoly" or engaged in "monopolistic conduct." Facebook's conduct is unlawful and violates the UCL regardless of whether it represents a violation of antitrust law. Plaintiff's UCL claim is a standard consumer claim that challenges Facebook's privacy policies. Facebook forced consumers to accept ever worse privacy settings and degraded privacy protections, which was unfair, unlawful, or fraudulent under the UCL, and Facebook has been unjustly enriched by that conduct. The issues raised by this action are purely state law issues.

¶¶45-46.

V. NO EXCEPTIONS TO THE "WELL-PLEADED COMPLAINT RULE" APPLY TO PLAINTIFF'S COMPLAINT

As this Court has noted, the presence or absence of federal-question jurisdiction is governed by the "well-pleaded complaint rule," which provides that "federal jurisdiction exists only when a federal question is presented on the face of the plaintiff's properly pleaded complaint." *Wise v. Suntrust Mortgage, Inc.*, 2011 U.S. Dist. LEXIS 44430 (N.D. Cal. April 18, 2011) at * 2 (citing *Caterpillar Inc. v. Williams*, 482 U.S. 386, 392, 107 S. Ct. 2425, 96 L. Ed. 2d 318 (1987)). This rule makes the plaintiff the master of her complaint and permits her to avoid federal jurisdiction by relying exclusively on state law. Ordinarily, therefore, federal question jurisdiction is determined from the face of the plaintiff's complaint. *Wise*, 2011 U.S. Dist. LEXIS 44430 at *2 (citing *Easton v. Crossland Mortg. Corp.*, 114 F.3d 979, 982 (9th Cir. 1997)). See also *Lippitt v. Raymond James Fin. Servs. Inc.*, 340 F.3d 1033, 1041 (9th Cir. 2003), as amended (Sept. 22, 2003) (quoting *Hansen v. Blue Cross of Cal.*, 891 F.2d 1384, 1389 (9th Cir. 1989)). Facebook admits that Plaintiff's Complaint does not assert a federal claim on its

1 face. Plaintiff's Complaint alleges only a state law claim and does not reference the federal
2 statute identified by Facebook.

3 There are only three exceptions to the "well-pleaded complaint rule" that make removal
4 appropriate, even if a plaintiff's complaint does not present a federal claim on its face. These
5 exceptions exist under the "artful pleading doctrine." The "artful pleading doctrine" is a
6 "corollary to the well-pleaded complaint rule" and provides that while "the plaintiff is the
7 master of his own pleadings, he may not avoid federal jurisdiction by omitting from the
8 complaint allegations of federal law that are essential to the establishment of his claim."
9 *Lippitt, supra*, 340 F.3d at 1041. Courts should "invoke the [artful pleading] doctrine only in
10 limited circumstances," however, "as it raises difficult issues of state and federal relationships
11 and often yields unsatisfactory results." *Sullivan v. First Affiliated Sec., Inc.*, 813 F.2d 1368,
12 1372 (9th Cir. 1987) (quoting *Salverson v. W. States Bankcard Ass'n*, 731 F.2d 1423, 1427 (9th
13 Cir. 1984)).

14 As this Court has noted, the "mere need to apply federal law in a state-law claim" does
15 not "suffice to open the 'arising under' door" to federal jurisdiction" *Wise, supra*, 2011 U.S. Dist.
16 LEXIS 44430 at *5 (citing *Grable & Sons Metal Products, Inc. v. Darue Engineering & Mfg.*,
17 545 U.S. 308, 313 (2005)). Thus, "the fact that a complaint references federal law, or that the
18 same facts would provide a basis for a federal claim, without more, does not convert a state law
19 claim into a federal claim." *Wise, supra*, 2011 U.S. Dist. LEXIS 44430 at *5.

20 Where a complaint does not present a federal cause of action on its face, a court may
21 exercise removal only under three circumstances: (1) federal law completely preempts state law;
22 (2) the claim is necessarily federal in character; or (3) the right to relief depends on the
23 resolution of a substantial, disputed federal question. *Lippitt, supra*, 340 F.3d at 1041-42; see
24 also *ARCO Envtl. Remediation, L.L.C. v. Department of Health & Envtl. Quality*, 213 F.3d
25 1108, at 1114 (9th Cir. 2000).

26 "Courts have fashioned a number of proxies to determine whether a state claim depends
27 on the resolution of a federal question to such an extent as to trigger subject matter
28 jurisdiction." *Lippitt, supra*, 340 F.3d at 1045. In evaluating whether jurisdiction exists, a court

1 must determine if the federal question goes to the gravamen of a plaintiff's claims, or, in other
 2 words, "[i]s the federal question 'basic' and 'necessary' as opposed to 'collateral' and 'merely
 3 possible'? Is the federal question 'pivotal' as opposed to merely 'incidental'? Is the federal
 4 question 'direct and essential' as opposed to 'attenuated?'" *Id.* (internal citations omitted).
 5 Nevertheless, "the mere presence of a federal issue in a state cause of action does not
 6 automatically confer federal-question jurisdiction." *Id.* at 1040.

7 Finally, a plaintiff may be able to defeat federal jurisdiction if an "alternative and
 8 independent" violation of state antitrust policies is offered as a basis for an unfair competition
 9 claim, even if a federal basis is also offered. *See Rains v. Criterion Systems, Inc.*, 80 F.3d 339,
 10 346 (9th Cir. 1996) ("When a claim can be supported by alternative and independent theories—
 11 one of which is a state law theory and one of which is a federal law theory—federal question
 12 jurisdiction does not attach because federal law is not a necessary element of the claim.").

13 Plaintiff's claims do not fit within any of the exceptions to the "well-pleaded complaint
 14 rule," and there is nothing wrongfully "artful" about Plaintiff's pleading. Further, even if there
 15 is a federal basis for holding Facebook accountable for the wrongs asserted by Plaintiff's UCL
 16 claim (which there is not), Plaintiff has offered a viable alternative basis – namely a state law
 17 theory based on unfair conduct regarding Facebook's degrading of users' privacy to levels
 18 unsustainable when other companies were subject to consumer privacy demands – further
 19 defeating federal question jurisdiction.

20 **A. Plaintiff's Claims are Not "Completely Preempted by Federal Law**

21 A claim is completely preempted when "federal law completely preempts state
 22 law and provides a federal remedy." *Ethridge v. Harbor House Rest.*, 861 F.2d 1389, 1403 (9th
 23 Cir. 1988). In their Notice of Removal, Defendants do not, and cannot in good faith, assert that
 24 Plaintiff's claims are "completely preempted" by federal law. (See Notice at p. 1.) This is
 25 especially true given that one of Plaintiff's claims is a UCL claim, which is a cause of action
 26 that has no federal corollary. *See Lippitt, supra*, 340 F.3d at 1036 (stating that the private
 27 remedy provided by the UCL is "categorically impossible" in a federal district court). Because
 28 Defendants do not assert that Plaintiff's claims are "completely preempted" by federal law, this

exception is not at issue. If none of plaintiff's claims are preempted, the face of the plaintiff's well-pleaded complaint does not arise under federal law and this Court does not have jurisdiction, compelling remand to state court. See *Firoozye v. Earthlink Network*, 153 F. Supp. 2d 1115, 1121 (N.D. Cal. 2001).

B. Plaintiff's Claims are Not "Necessarily Federal in Character"

Facebook asserts that removal is appropriate because "Rosenman's Section 17200 claim is necessarily predicated on alleged violations of federal antitrust law.)" (See Notice at p. 6.) Facebook suggests that Plaintiff "will necessarily have to establish that Facebook violated federal antitrust law," merely because she references Facebook's monopolistic activity." (*Id.* pp. 6-7.) In essence, Facebook seeks removal because Plaintiff's claims use similar terminology as Sherman Act claims. This, however, is not the standard for determining whether Plaintiff's claims are "necessarily federal in character."

A claim is "necessarily federal in character when it falls within the express terms of a statute granting federal courts exclusive jurisdiction over the subject matter of the claim." *Hendricks v. Dynegy Power Mktg., Inc.*, 160 F. Supp. 2d 1155, 1161 (S.D. Cal. 2001). Mere reference to, or mention of, a federal statute—which is absent here—is not enough to trigger the exception. See *L.A.M.B. Oxford Mgmt. & Tech. Co. v. Rutkowski*, No. 18-CV-02522-LHK, 2018 U.S. Dist. LEXIS 88497, at *4 (N.D. Cal. May 25, 2018) citing *Grable*, 545 U.S. at 314 (finding that even where a plaintiff mentions a federal law, a state law cause of action may not necessarily raise a federal issue). See *Grable*, 545 U.S. at 314). A plaintiff's claim may include "incidental reference to a federal statute or the U.S. Constitution" without transforming it into a federal one. *Easton v. Crossland Mortg. Corp.*, 114 F.3d 979, 982 (9th Cir. 1997). Moreover, a plaintiff's claim may even make "repeated references" to a federal statute without creating a cause of action under that federal statute. See *ARCO*, 213 F.3d at 1113. Here, none of Plaintiff's claims even refer to federal statutes like the plaintiffs' claims in *L.A.M.B.*, *Easton* and *ARCO* did, yet in each of those cases the court nonetheless determined that remand was appropriate.

The court's approach in *Lippitt* is instructive in this case. There, plaintiff sued a number of defendants under the UCL for alleged false advertising with respect to financial instruments

1 called “callable CDs.” *Lippitt, supra*, 340 F.3d at 1036. Defendants attempted to remove the
 2 case to federal court, arguing the UCL claim was “necessarily federal in character,” but the
 3 Ninth Circuit disagreed and remanded the case to state court. *Id.* at 1036, 1046. The court held
 4 that while the alleged misconduct discussed in plaintiff’s complaint “overlap[ped] with conduct
 5 that was likewise proscribed by [federal law,]” plaintiff was attempting only to enforce state, not
 6 federal, law. *Id.* at 1037. The court stated, “[e]nforcement is the key word here. [Plaintiff] seeks
 7 only to enforce the state law. He seeks no enforcement of any [federal law]. *Id.* The court
 8 further held that the complaint’s repeated references to federal agencies, issues, and actions
 9 were “not enough to confer federal question jurisdiction.” *Id.* at 1040-41.

10 Applying *Lippitt*, Plaintiff seeks only to enforce California state laws. See Complaint
 11 ¶¶45-46, 49, 68. (“All claims alleged herein arise under California law for which Plaintiff seeks
 12 relief authorized by California law.”) Nowhere in the Complaint does she allege or reference
 13 any request or intent to enforce any federal law. Even if the Complaint could be construed to
 14 allege conduct that may be “likewise proscribed” by the Sherman Act, *Lippitt* makes clear that
 15 such overlap is not enough to support removal to federal court. *Id.* at 1037. As evidenced
 16 throughout the Complaint, Plaintiff’s UCL and unjust enrichment claims have the specific goal
 17 of protecting California consumers from Facebook’s unfair and unlawful business practices; that
 18 this goal may also comport with the broader regulatory goals of the Sherman Act “is not enough
 19 to sweep [Plaintiff’s claims] within [its] exclusive jurisdictional ambit.” *Id.* at 1044.

20 Finally, Plaintiff’s supposed use of terms such as “monopoly” and “monopoly power”
 21 does not automatically “federalize” Plaintiff’s claims, as Facebook seems to suggest. Contrary
 22 to Facebook’s assertion (Notice at 6), Plaintiff nowhere alleges that “Facebook has an illegal
 23 monopoly.” Moreover, Plaintiff’s Complaint can mention or refer to “anticompetitive acts” or
 24 competition” without grounding her claims in federal antitrust law because the UCL specifically
 25 seeks to proscribe anticompetitive conduct, which is broadly defined under the UCL to include
 26 any unlawful, unfair, or deceptive conduct that is injurious to consumers, Plaintiff’s UCL claim
 27 it is not predicated on any monopolistic conduct. Plaintiff’s UCL claim is a consumer protection
 28

claim that purely challenges the fact that Facebook infringed on and degraded consumer privacy.

Again, *Lippitt* dealt with a nearly identical issue and rejected defendants’ removal attempt.

C. Plaintiff’s Claims do not Depend on “Resolution of a Substantial, Disputed Federal Question”

A state law claim falls within this second category when: (1) “a substantial, disputed question of federal law is a *necessary* element of . . . the well-pleaded state claim,” or the claim is an “inherently federal claim” articulated in state-law terms or (2) “the right to relief depends on the resolution of a substantial, disputed federal question.” *Lippitt, supra*, 340 F. 3d at 1041 (internal citations omitted) (emphasis in original). A careful reading of artful pleading cases shows that no specific recipe exists for a court to alchemize a state claim into a federal claim – a court must look at a complex group of factors in any particular case to decide whether a state claim actually “arises” under federal law. *Id.*

Here, federal law is not a necessary element of Plaintiff’s claim, and Plaintiff does not have to rely on a violation of the Sherman Act to bring a UCL claim in state. Plaintiff’s allegations of unfair conduct do not require a finding that Facebook has violated antitrust laws.

Critically, Plaintiff’s allegations would survive, and would not fail as a matter of law, if the Court were to disregard the supposed allegations regarding Facebook’s monopoly position. That is because Plaintiff’s theory does not rest on a finding that Facebook is a monopoly.

Plaintiff need only show that Facebook’s conduct is unfair as alleged in the Complaint in that Facebook engages and has engaged in a systematic business practice of successfully degrading its users’ privacy to levels unsustainable when other competitors were subject to consumer privacy demands. ¶67. As the Complaint alleges, “Facebook’s conduct has caused consumers to suffer and to continue to suffer substantial economic injury through the degradation of their privacy. Consumers give up something of material value when agreeing to Facebook’s Terms of Service: personal information and privacy. That information and attention is then sold by Facebook in measurable units to advertisers in exchange for substantial amounts

1 of money. Consumers thus give up valuable consideration in using Facebook pursuant to
2 Facebook’s Terms of Service.” ¶68.

3 Plaintiff’s UCL claim is a consumer protection claim that challenges the methods used
4 by Facebook to infringe on consumer privacy. Plaintiff’s unfair claim is based on state law
5 theories and is independent of any federal statutory basis. It does not depend on any violation of
6 antitrust law or require establishing a violation of federal antitrust law. There is no “basic” or
7 “pivotal” federal question that impinges on her right to relief.

8 The Ninth Circuit reached a similar conclusion in *Lippitt*. In *Lippitt*, plaintiff brought
9 claims under §17200 of the UCL. *Lippitt, supra*, 340 F.3d at 1043. The court noted that,
10 although plaintiff’s UCL §17200 claim could succeed based on a violation of federal law—
11 there, the 1934 Securities Exchange Act—his allegations that the conduct was *unfair* under
12 §17200—a proposition that can be shown by conduct that is less than unlawful—precluded
13 removal. *Id.* The court noted that, “[i]f a plaintiff can support his claim with ‘alternative and
14 independent theories—one of which is a state law theory and one of which is a federal law
15 theory—federal question jurisdiction does not attach.’” *Id.* (quoting *Rains*, 80 F.3d
16 at 346). The court held that because UCL §17200, by its very nature, allows the violation to rest
17 on alternative theories-unfair, unlawful, or fraudulent conduct-federal subject-matter jurisdiction
18 had not attached. *Id.*

19 *Hendricks* likewise involved a UCL §17200 claim based on both unfair and unlawful
20 business practices. 160 F. Supp. 2d at 1164-65. The court noted, “‘To bring a case within the
21 [federal-question removal] statute, a right or immunity created by the Constitution or laws of the
22 United States must be an element, and an essential one, of the plaintiff’s cause of action.’” *Id.* at
23 1162-63 (quoting *Gully v. First Nat’l. Bank in Meridian*, 299 U.S. 109, 112 (1936)).

24 *Central Valley Med. Group, Inc. v. Independent Physician Associates Medical Group,*
25 *Inc.*, 2019 U.S. Dist. LEXIS 124388 (E.D. Cal. July 25, 2019) is also instructive. In that case,
26 Plaintiff’s initial complaint made *explicit* references to federal antitrust law. After the action was
27 removed, Plaintiff amended the Complaint to remove the references to federal antitrust law and
28 instead pleaded as the necessary predicate violation for the UCL unfair business practices claim

that defendant’s conduct “offends the policies of free competition and free trade, and significantly threatens or harms competition.” *Id.* at *8. The court held that that there was no federal question jurisdiction. The court reasoned that “a violation of the unfair prong may be based on conduct that ‘significantly threatens or harms competition,’ regardless of whether it represents an actual or incipient violation of an antitrust law.” *Id.* at *8. The court held that plaintiff could establish an unfair claim under the UCL by alleging conduct that harms or threatens competition, separate and apart from antitrust allegations. *Id.* at *12-13. Similarly, here, since Plaintiff Rosenman can support her claims with alternative and independent theories – one of which is a state law theory that does not depend on federal law theory – federal question jurisdiction does not attach.

Simply put, to prevail on her UCL claim, Plaintiff need only show that Facebook engaged in “any unlawful, unfair, or fraudulent business act or practice,” or made material misrepresentations or omissions with respect to its data privacy practices and commercial surveillance. Cal. Bus. & Prof. Code §17200. As stated above, Rosenman need not depend on a violation of federal law to bring her UCL claim. There is no “basic” or “pivotal” federal question that impinges on her right to relief. Plaintiff’s unjust enrichment claim can similarly succeed on the theory that Facebook’s conduct of forcing consumers to accept ever worse privacy settings and degraded privacy protections was unfair, unlawful, or fraudulent under the UCL, and that Facebook has been unjustly enriched by that conduct, which is a purely state law issue.

None of the cases cited by Facebook in its Notice of Removal compel the Court to retain jurisdiction. Indeed, Facebook’s citations to *In re Nat’l Football Leagues Sunday Ticket Antitrust Litig.* and *Nat’l Credit Reporting Ass’n, Inc.* are entirely inapposite. Liability under the UCL in those cases entirely relied on defendants’ alleged abuse of their monopoly position and charging unreasonably high, supra-competitive prices. Plaintiffs in those cases either failed to allege conduct that threatened competition *regardless* of whether it represented an actual or incipient violation of an antitrust law, or specifically referenced defendants’ violations of federal antitrust laws in the complaint. See *In re Nat’l Football Leagues Sunday Ticket Antitrust Litig.*,

2016 WL 1192642, at *5 (C.D. Cal. Mar. 28, 2016) (finding remand inappropriate where defendants’ alleged “abuse of its monopoly position” and charging “supra-competitive prices” depended on defendants’ actual or incipient violation of a federal antitrust law); see also *Nat’l Credit Reporting Ass’n, Inc.*, 2004 WL 1888769, at *4 (N.D. Cal. July 21, 2004) (finding remand inappropriate where plaintiff specifically referenced a violation of federal antitrust laws in the complaint despite asserting a single state-law claim).

In contrast, Plaintiff Rosenman’s UCL claim does not depend on a violation of federal antitrust law, and is independent of a federal antitrust theory.

VI. CONCLUSION

For the foregoing reasons, Plaintiff primarily respectfully requests that this court remand this action back to the San Mateo County Superior Court

Dated: April 26, 2021

Respectfully submitted,

POMERANTZ LLP

By: /s/ Ari Y. Basser
Jordan L. Lurie
Ari Y. Basser

Attorneys for Plaintiff